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No. 02-1657

IN THE

Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. The opposition's most important feature, and the only one that bears on whether review is warranted, is its repeated acknowledgment of a direct conflict among the circuits on the question presented. *See, e.g.,* Opp. 4, 5, 17, 18. Despite this concession, the government says that review should be denied because the conflict "creates no material inconsistency" as lawyers "in the Federal Circuit are on notice" of its strict rule concerning the jurisdictional prerequisites for EAJA applications. *Id.* at 18. If that were a proper basis for denying certiorari, however, this Court would never grant review in a case where it could be said that the rule imposed by the court of appeals does not affect "primary conduct," *see id.*, and that litigants need only adhere strictly to that rule no matter how technical, picayune, or at odds with Congressional intent.

But this Court consistently rejects that approach, as it did when it granted certiorari in this very case and remanded in light of *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). It also rejected that approach in a host of other cases where the litigant did not strictly follow the stated rule, but presumably could have done so. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001) (entertaining question whether requirement that notice of appeal be signed is jurisdictional or subject to amendment after time to appeal has run); *Smith v. Barry*, 502 U.S. 244 (1992) (entertaining question whether failure to file notice of appeal as required by Federal Rule of Appellate Procedure 3 is cured by filing of appellate brief that contains functional equivalent of what Rule requires); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990) (entertaining question whether Title VII's limitations period as applied to government is jurisdictional or subject to equitable exceptions); *Torres v. Oakland Scavenger Co.,* 487 U.S. 312 (1988) (entertaining question whether requirement that notice of appeal name all appellants must be literally followed or "et al." designation is

sufficient in some circumstances); *Foman v. Davis*, 371 U.S. 178 (1962) (entertaining question whether appellant must strictly comply with requirement that notice of appeal refer specifically to order appealed from or whether court may look beyond notice to ascertain appellant's intent). In each of these cases, a court of appeals had put future litigants on notice that the relevant rule would be strictly observed without exception, yet the Court granted certiorari to determine the correct outcome and promote national uniformity on an important issue of federal law.

Apart from promoting uniformity, the Court should resolve the circuit split for a more fundamental reason. The government's rationale for overlooking the circuit split presupposes that no important purpose is served by a rule that permits flexibility in construing a Congressional limitations period. That is not so. Doctrines that allow amended pleadings and motions to "relate back" to the original filing date, and concepts of equitable tolling, estoppel, waiver, and the like do, in fact, serve an important purpose: They recognize that both lay people and lawyers sometimes make mistakes, and they ask whether, under the circumstances, those mistakes ought to be excused because the benefit of doing so outweighs the harm created by strict imposition of a time bar or other procedural rule. *See, e.g., Foman*, 371 U.S. at 182 ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."); *cf. Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."). Thus, the government's position — that future EAJA fee applicants in the Federal Circuit can avoid a problem by

strictly adhering to the 30-day time period — simply assumes the answer to the basic question whether Congress intended that the various goals of EAJA would be best served by a strict jurisdictional time bar or by a more flexible rule such as that adopted by the Third, Sixth, and Eleventh Circuits.

2. Unable to deny the circuit split, the government devotes most of its argument to the proposition that the Federal Circuit's holding is correct. Opp. 7-17. That a respondent believes that the decision below is correct is not a sufficient reason to leave a split in appellate authority unresolved, especially where three circuits fundamentally disagree with respondent's position on the question presented.

a. As the Third, Sixth, and Eleventh Circuits have explained, even assuming that the 30-day filing deadline is jurisdictional and admits of no exceptions, there is no reason to believe that Congress intended that jurisdictional bar to apply to the contents of the fee application. *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985); *United States v. True*, 250 F.3d 410 (6th Cir. 2001); *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000).[1] Rather, as those courts have explained, once a timely fee application is filed, EAJA's concerns with timeliness, finality, and reliance "have been satisfied[,]" *see, e.g., Dunn*, 775 F.2d at 104, and there is no basis for extending the 30-day time limit to EAJA's pleading requirements. As a result, those courts have permitted supplementation of a timely fee

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[1]The government concedes that there is also a conflict in the circuits on the antecedent question whether EAJA's 30-day period is jurisdictional. Opp. 13 (citing *Luna v. Dept. Of HHS*, 948 F.2d 169, 173 (5th Cir. 1991), which held that EAJA's 30-day limit is not jurisdictional and is subject to equitable tolling). *See* Pet. 23-24 (describing the conflict).

application, absent prejudice to the government.

b. The government offers no meaningful response to the fact that the statute's limitation period is contained in a separate sentence from its requirement that the party allege that the position of the United States was not substantially justified. Thus, even if EAJA's other pleading requirements must be completed within 30 days — a conclusion flatly rejected by *Dunn*, *True*, and *Singleton* — that cannot be said for the no-substantial-justification allegation. The government's only response is to speculate that Congress placed what an application must "show" in a different sentence from what a party must "allege" in "an effort to preserve parallel sentence structure." Opp. 8 n.1. Even if it were grammatically difficult to list all four pleading items in the first sentence of 28 U.S.C. § 2412(d)(1)(B), that would not explain why Congress did not add a 30-day time period in the second sentence of that section if it wanted that sentence to bear the meaning given to it by the Federal Circuit.

In any event, use of two separate sentences was not grammatically necessary. If Congress had wanted to merge the two sentences into one, it could have done so very easily, just as the Solicitor General has done twice in its opposition. Opp. 8, 15; *see also* Pet. App. 4a (Federal Circuit opinion also merging both sentences into one without grammatical incident). Thus, when construing the two distinct and differently worded sentences of section 2412(d)(1)(B), courts should apply the "general[] presum[ption] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (internal quotation marks and citation omitted); *see also, e.g., Edelman*, 535 U.S. 106 (limitations period for filing Title VII charge of

discrimination contained in one subsection of 42 U.S.C. § 2000e-5 does not apply to other subsection's requirement that charge be verified); *Quern v. Mandley*, 436 U.S. 725, 741-42 (1978) (specific requirements explicitly applicable to one state program funded under Social Security Act does not apply to another such program because "there is every reason to suppose that the exclusion of [that program] from [the] specific substantive requirements . . . was deliberate").

c. Even assuming that Congress contemplated that section 2412(d)(1)(B)'s pleading requirements be met within the 30-day period, that period is not a "jurisdictional" time bar, but rather a statute of limitations subject to equitable exceptions. *See* Pet. 17-19. Therefore, an amendment to an EAJA fee application, such as the amendment filed by petitioner just days after the government moved to dismiss his application, "relates back" to the original filing date, *see Edelman*, 535 U.S. 106; *see also Becker v. Montgomery*, 532 U.S. 757 (2001); Fed. R. Civ. P. 15(c), and fee applicants may avoid dismissal under equitable doctrines such as tolling, estoppel, and waiver, absent prejudice to the government.[2]

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[2]As explained in the petition (at 22), EAJA's 30-day filing period is not jurisdictional because it applies to fee applications filed "in any court" already "having jurisdiction" in the underlying action. 28 U.S.C. § 2412(d)(1)(A). The government's only response is tautological: It claims that EAJA "does not purport to give the court jurisdiction" and then cites cases holding that the 30-day period is "jurisdictional." Opp. 10. Thus, the government does not respond to the criticism that its reading of EAJA would require litigants such as petitioner to establish jurisdiction in the same court twice — once when they file the underlying action and again when they file their fee application — which is unprecedented and makes no sense. This point serves to show why the government's reliance on cases

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The government's position relies heavily on a Senate Report that states that section 2412(d)(1)(B)'s filing period "is jurisdictional and cannot be waived." Opp. 7 (quoting S. Rep. No. 98-586 16 (1984)). Even if reliance on the report were appropriate, a snippet in a committee report cannot overcome the *Irwin* presumption that time limits that run in favor of the government are *not* jurisdictional unless "Congress ... provide[s] otherwise." 498 U.S. at 96. In any event, the committee report cited by the government is not valid authority because it was prepared for a 1984 version of EAJA passed by the *98th Congress* and *vetoed* by the President. *See* H.R. Rep. No. 99-120 (I) 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134; *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring).

The government acknowledges that this report accompanied vetoed legislation, but claims it is reliable nonetheless because the Court has cited it in EAJA cases. Opp. 10 n.2. However, for present purposes, its inherent *unreliability* is demonstrated by the more in-depth House Report from the *99th Congress* that accompanied the bill that actually became law in 1985, which contains the same general discussion of the statute's limitations period and cites the same authority as did the earlier 1984 report, *but omits the language upon which the government relies.* H.R. Rep. No. 99-120 (I) 19-20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148. Indeed, it would have been anomalous for the 99th Congress to have made the limitation period strictly jurisdictional because,

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concerning the content requirements for notices of appeal are irrelevant. *See* Opp. 16 (citing, *e.g.*, *Torres*, 487 U.S. 312). A notice of appeal serves to confer jurisdiction on a court in the first instance; a fee application does not.

at the same time, it urged that the period not be construed in an "overly technical" manner as a "trap for the unwary." *Id.* at 18 n.26; H.R. Rep. No. 99-120 (II) 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156. In sum, there is no basis for the government's assertion that EAJA's 30-day filing period is an absolute jurisdictional bar.

d. The government argues that petitioner cannot rely on the equitable tolling principles of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), on the ground that he did not raise them in his opening brief in the Federal Circuit. Opp. 12.[3] Not so. Petitioner raised equitable tolling and estoppel, as well as the equitable principles enunciated in *Dunn* and *Singleton*, in both his opening and reply briefs in the Federal Circuit. Brief for Appellant, at 5-10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000); Reply Brief for Appellant, at 3-5, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 24, 2001). Indeed, the government acknowledged petitioner's arguments on this score, and asserted that, regardless of the facts, petitioner's application was barred because the 30-day period imposed an absolute jurisdictional bar. Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

Equally important, at three stages before this Court and the Federal Circuit — in his first petition for certiorari, on remand from this Court, and on rehearing en banc prior to remand — petitioner raised equitable tolling and three times the

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[3]Notably, the government does not argue that the question whether EAJA's limitation period is jurisdictional — which also involves application of *Irwin* — has been waived, nor could it since that question is at the heart of the circuit split, was argued extensively below, and formed the basis of both Federal Circuit decisions.

government argued the merits of equitable tolling without asserting that the argument had been waived. Not until its brief in response to petitioner's request for rehearing en banc after this Court's remand did the government breathe a word about waiver. Even there, it did so only in passing, suggesting that petitioner should be defaulted for failing to use the magic words "tolling" or "relation back," but acknowledging that petitioner raised the substance of the argument. Corrected Appellee's Resp. to Pet. for Rehearing En Banc, at 14 & n.8, in *Scarborough v. Principi*, No. 00-7172. *See Nelson v. Adams*, 529 U.S. 460, 469 (2000) (the general rule that issues be raised to be preserved "does not demand the incantation of particular words; rather it requires that the ... court be fairly put on notice of the substance of the issue."). Thus, if anyone has waived an argument, it is the government by arguing the tolling issue over the course of many briefs without suggesting that petitioner had forfeited it. *See Engle v. Isaac*, 456 U.S. 107, 125 n.26 (1981) (declining to consider habeas corpus petitioner's claim that government waived an argument because petitioner's waiver argument had itself been waived); *Geva v. Leo Burnett Co.*, 931 F.2d 1220, 1225 (7th Cir. 1991) (considering defendant's claim of waiver to be waived); *Wilson v. Attaway*, 757 F.2d 1227, 1247 (11th Cir. 1985) (plaintiff's assertion that qualified immunity had been waived came too late and was itself waived).[4]

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[4]The government claims that this case is not an appropriate vehicle to consider tolling because "the Court below did not consider the issue." Opp. 13. That assertion makes no sense. The Federal Circuit did not *explicitly* address that issue for an obvious reason: It held, contrary to the rule in three other circuits, that EAJA's pleading requirements are "jurisdictional" and not subject to *any* exceptions. Pet. App. 5a-10a. It did not allow petitioner to amend his fee

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On the question whether tolling applies here, the government relegates to a footnote its conclusory response to petitioner's claim that he is entitled to tolling under *Irwin*, which requires that he "actively pursued his judicial remedies by filing a defective pleading during the statutory period[.]" 498 U.S. at 96; *see* Opp. 14 n.5. The government does not dispute that, as a factual matter, petitioner meets this standard, but rather says that equitable tolling is not available just because that standard has been met. *Id.* To be sure, the doctrine may not apply where the adverse party would suffer prejudice from tolling. But in explaining the applicable standard, *Irwin* provided specific examples in which this Court has allowed tolling — involving the timely filing of a complaint *in the wrong court*. *Id.* at 96 n.3 (citing cases). If anything, those cases were less deserving of forbearance than the situation here, where petitioner "actively pursued his judicial remedies" *in the correct court*, *id.* at 96, by filing a timely fee application that was defective, if at all, only because it was missing a one-sentence legal conclusion.

3. After devoting nearly its entire brief to the claim that EAJA's 30-day period permits no exceptions, the government switches gears. It ends its brief by arguing that the decision below will not prejudice fee applicants too greatly because "as long as an applicant timely alleges the pleading jurisdictional prerequisites under EAJA," the applicant will be granted "'some latitude to supplement his application to flesh out the missing details.'" Opp. 18 (quoting Pet. App. 9a). The "some latitude" standard is imprecise and does not apprise fee

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[4](...continued)
application to supply the no-substantial-justification allegation because it believed that it was without power to excuse any non-compliance with the 30-day deadline.

applicants of what is expected or provide guidance to the lower tribunals within the Federal Circuit. Under the "some latitude" standard, that court has excused an EAJA applicant's failure to make any allegation about his fee eligibility (net worth) on the ground that the net-worth allegation is "subsumed" by an applicant's statement that he was the prevailing party, *see Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998), even though there is no obvious relation between the two concepts. By contrast, the Federal Circuit affirmed the dismissal of petitioner's application, even though it contained the prevailing-party allegation, on the ground that it did not include a no-substantial-justification allegation, even though the two concepts are intimately related, since both concern how the government fared on the merits of the litigation. And, recently, the Court of Appeals for Veterans Claims refused to allow amendment of an EAJA application to supply two of the four pleading requirements that were contained in a part of the application that was lost during fax transmission to the court clerk, even though the application was served on the government and faxed to the court on a timely basis. *Urquhardt v. Principi*, 2003 WL 1463586 (Vet. App. Mar. 19, 2003). The court opined that it preferred the Third Circuit's approach in *Dunn*, but that its hands were tied by the decision below. *Id.* at *2. So much for "some latitude." Far from providing a reason to deny review, given the high volume of EAJA cases under the Federal Circuit's supervision, *see* Pet. 5 & n.1, 19-21 & n.6, the government's embrace of the "some latitude" standard underscores the need for this Court to grant the petition and resolve the conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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